POWDERHORN COAL CO.
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT
(ON RECONSIDERATION)

IBLA 93-458 Decided February 9, 1995

Petition for reconsideration and request for reconsideration en banc of Board decision in Powderhorn Coal Co. v. OSM, 129 IBLA 22 (1994).

Petition for reconsideration granted in part and denied in part; decision reaffirmed as clarified.

1. Surface Mining Control and Reclamation Act of 1977: Temporary Relief: Applications--Surface Mining Control and Reclamation Act of 1977: Temporary Relief: Evidence

A substantial likelihood of success on the merits required to be shown by an applicant for temporary relief from a citation under sec. 525(c) of SMCRA, may be found where applicant has raised issues on the merits of the case so "serious, substantial, difficult and doubtful" as to make them appropriate for deliberative resolution in a decision on the merits, rather than in a preliminary determination on the application for temporary relief. The finding required to support temporary relief is properly distinguished from the basis of a final decision on the merits. Thus, when we are unable to uphold the enforcement action as a preliminary matter on the basis of the record before us, a showing of a substantial likelihood of success on the merits has been made which will justify temporary relief assuming the other statutory criteria are met.

APPEARANCES: John S. Retrum, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Office of Surface Mining Reclamation and Enforcement; Robert S. More, Esq., Office of the Solicitor, Washington, D.C., of counsel; M. Julia Hook, Esq., and Kenneth D. Hubbard, Esq., Denver, Colorado, for the Powderhorn Coal Company.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Counsel for the Office of Surface Mining Reclamation and Enforcement (OSM) has filed a petition for reconsideration of our decision in the above-captioned case, cited as Powderhorn Coal Co. v. OSM, 129 IBLA 22 (1994). Petitioner has also requested that this matter be reconsidered by the entire Board en banc.

Our decision in this case affirmed a ruling of the Administrative Law Judge, issued after a hearing, granting temporary relief from enforcement of notice of violation (NOV) No. 93-020-370-001 issued by OSM. In reviewing this grant of relief under the Surface Mining Control and Reclamation Act of 1977 (SMCRA), we noted that:

> Pursuant to section 525(c) of SMCRA and its implementing regulations, the Secretary of the Interior, and his delegated representatives, are authorized to grant temporary relief from an NOV pending a decision on an application for review of that NOV, where, among other things, the applicant for such relief shows that "there is a substantial likelihood that the findings and decision of the administrative law judge in the matters to which the application relates will be favorable to the applicant." 43 CFR 4.1263(b); 30 U.S.C. § 1275(c) (1988); see Shamrock Coal Co. v. OSM, 81 IBLA 374, 376 (1984), appeal dismissed, Shamrock Coal Co. v. Hodel, No. 84-238 (E.D. Ky. May 13, 1987). In addition, there must be a showing that granting the application for temporary relief will not have an adverse affect on public health or safety or cause significant, imminent environmental harm to land, air, or water resources. See 30 U.S.C. § 1275(c) (1988); 43 CFR 4.1263(c).

129 IBLA at 27. After finding from the record that there was no issue that temporary relief would not adversely affect the public health or safety or cause significant, imminent environmental harm to land, air, or water resources, the Board went on to review the question of substantial likelihood of success on the merits.

Notwithstanding the ambiguity in the language of the Administrative Law Judge's ruling from the bench at the conclusion of the hearing which was challenged on appeal by OSM, we proceeded to examine the meaning of the term and apply it to the evidence of record. In deciding this issue we found that:

> The statute and regulations do not define the term "substantial likelihood" and we have not been presented with citation to any prior Board precedent on this issue. We think the standard for this term must be defined in a manner consistent with

> the nature of the relief which the statutory provision provides, i.e., a stay or injunction pending administrative review on the merits. One of the basic criteria applied by courts and by this Board in its quasi-judicial administrative review role when considering such relief is the moving party's likelihood of success on the merits. See, e.g., Placid Oil Co. v. U.S. Department of the Interior, 491 F. Supp. 895 (N.D. Texas 1980); Marathon Oil Co., 90 IBLA 236, 93 I.D. 6 (1986); 43 CFR 4.21(b)(2) (58 FR 4943 (Jan. 19, 1993)). Where the balance of hardship to the parties from not granting temporary relief tips decidedly in favor of the applicant, we find that in order to justify temporary relief it is not necessary that the applicant's right to prevail on the merits of the controversy be free from doubt where he "has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation." Hamilton Watch Co. v. Benrus, 206 F.2d 738, 740 (2nd Cir. 1953), quoted in Placid Oil Co. v. U.S. Department of the Interior, 491 F. Supp. at 905; Sierra Club, 108 IBLA 381, 384-85 (1989). Upon review of the record in the present case, we must affirm the Administrative Law Judge on the ground that this standard has been met. 7/
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> 7/ Regardless of any deficiency perceived by OSM in the wording of the Administrative Law Judge's ruling from the bench, we note that the Board is vested with de novo review authority to decide the question on appeal from the decision of the Administrative Law Judge. U.S. Fish & Wildlife Service, 72 IBLA 218 (1983)).

129 IBLA at 28. Recognizing that action by the State regulatory authority which is not "arbitrary, capricious, or an abuse of discretion" under the State program shall be considered "appropriate action" to secure abatement of a violation, 30 CFR 842.11(b)(1)(ii)(B)(2), we found that based on the record "Powderhorn established a substantial likelihood of success on the ground that the State NOV was not an abuse of discretion under the State program and, hence, that the OSM citation was improvidently issued." 129 IBLA at 29.

As grounds for reconsideration, OSM argues the meaning of the term "likelihood," asserting it means "more likely than not" rather than a mere possibility. Thus, OSM contends the term "substantial likelihood" requires a showing that the applicant is "substantially" more likely than not to prevail. Concern is expressed that the Board is adopting a standard based on a substantial "possibility" of success. OSM asserts that the "balance of hardship," a term frequently utilized in cases involving stays and injunctive relief, is not found in the language of SMCRA. Further, OSM asserts that use of such an analysis in granting injunctive relief under

SMCRA was rejected by the court in Virginia Surface Mining & Reclamation Ass'n. v. Andrus, 604 F.2d 312 (4th Cir. 1979). Petitioner argues that the Board's decision has lowered the standard for obtaining temporary relief so as to make virtually every NOV subject to temporary relief. Finally, OSM contends that the Board should reverse its decision affirming the Administrative Law Judge's grant of temporary relief. 1/

After reviewing the OSM petition, we find that the Virginia Surface Mining & Reclamation Ass'n. case does not support a different holding in this decision. In that case on appeal from a district court injunction against Departmental enforcement of SMCRA, the decision noted that the lower court had determined that "it was not necessary to determine whether the plaintiffs are likely to succeed on the merits" in issuing an injunction barring enforcement. 604 F.2d at 315. The circuit court held that the statutory criteria found at section 526(c) of SMCRA 2/ are applicable to injunctions precluding enforcement of SMCRA and that the lower court erred in failing to consider whether there was a substantial likelihood plaintiffs would succeed on the merits based on the finding that the plaintiffs would suffer irreparable injury and there was scant evidence of harm to other parties or the public interest (balance of harm). 604 F.2d at 315. The circuit court also cited the failure of the enjoining court to consider whether relief will adversely affect public health or safety or cause imminent environmental harm. Id.

[1] The decision of the Board in Powderhorn, on the other hand, expressly applied the statutory criteria for temporary relief found in section 525(c) of SMCRA. Specifically, in finding that a substantial likelihood of success on the merits had been shown, we held that

> it is not necessary that the applicant's right to prevail on the merits of the controversy be free from doubt where he "has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and

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1/ No basis in the record is asserted for this contention that the evidence does not support a finding that the applicant demonstrated a substantial likelihood of success on the merits as the Board found. Rather, OSM asserts that the Board should reexamine "the record and the previous arguments of the parties" (Petition at 15).

2/ 30 U.S.C. § 1276(c) (1988). Although section 526(c) of SMCRA applies to the grant of temporary relief by a court on judicial review of an enforcement proceeding, the standards for relief are stated in similar terms requiring a showing of "substantial likelihood" that petitioner will prevail on the merits as well as a finding that such relief "will not adversely affect the public health or safety or cause significant imminent environmental harm to land, air, or water resources."

> thus for more deliberative investigation." Hamilton Watch Co. v. Benrus, 206 F.2d 738, 740 (2nd Cir. 1953), quoted in Placid Oil Co. v. U.S. Department of the Interior, 491 F. Supp. at 905; Sierra Club, 108 IBLA 381, 384-85 (1989).

128 IBLA at 28. It appears that OSM has construed our reference to the "balance of hardship" and quotation of language from the Hamilton Watch case as a substitution of a balance of hardship standard for the required substantial likelihood of success, an approach not supported either by the statutory language or the court decision in the Virginia Surface Mining & Reclamation Ass'n. case. However, this is not a proper reading of our opinion in context. Rather, we held that a substantial likelihood of success may be found where applicant has raised issues on the merits of the case so "serious, substantial, difficult and doubtful" as to make them appropriate for deliberative resolution in a decision on the merits rather than a preliminary determination on application for temporary relief. Likelihood is, above all, a question of probability. Thus, a substantial likelihood of success is properly found where, as in this case, the record on initial review appears insufficient to support the enforcement action taken. While the quantum of showing required to establish that a proposition is "substantially" more likely than not (the standard argued by OSM) is unclear, 3/ the finding required to support temporary relief is properly distinguished from the basis of a final decision on the merits. When we are unable to uphold the enforcement action as a preliminary matter on the basis of the record before us, a showing of a substantial likelihood of success on the merits has been made which will justify temporary relief assuming the other statutory criteria are met.

A petition for reconsideration may be granted only in extraordinary circumstances where good reason is shown therefor. 43 CFR 4.21(c); 43 CFR 4.403. We find that petitioner's apparent confusion regarding the meaning of our prior opinion regarding substantial likelihood of success justifies granting the petition for the limited purpose of clarifying the language of our prior decision in this matter. Accordingly, the petition for reconsideration is granted in part and denied in part and we reaffirm our prior decision as clarified.

Petitioner has sought reconsideration by the Board en banc. In responding to such requests, the Board follows a procedure similar to

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3/ We note that in order to prevail on the merits before the Board, an appellant must establish error by a preponderance of the evidence. Bender v. Clark, 744 F.2d 1424, 1429 (10th Cir. 1984) (reversing a Board decision which affirmed the administrative decision on the basis of a failure to establish error by clear and definite evidence).

that set forth at Rule 35(b) of the Federal Rules of Appellate Procedure. Thus, en banc consideration is not required where, as here, after full circulation of the motion and dispositive order or decision prepared by the assigned panel, no member of the Board requests a vote on whether the matter should be considered en banc. See Stoddard Jacobsen v. BLM, 103 IBLA 83, 85 n.5 (1988).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the motion for reconsideration is granted in part and denied in part and the decision is reaffirmed as clarified.

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C. Randall Grant, Jr.
Administrative Judge

I concur:

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Gail M. Frazier
Administrative Judge